diagnostic opinions, information obtained upon a promise of confidentiality, and information which, if disclosed, might result in harm to any person, and that "the remaining parts of the reports are not covered by this exemption, and thus must be disclosed unless there is some other exemption which applies to them."[155]

Another Exemption 3 issue concerns the Trade Secrets Act[156] which prohibits the unauthorized disclosure of certain commercial and financial information. Although the Supreme Court has declined to decide whether the Trade Secrets Act is an Exemption 3 statute,[157] most courts confronted with the issue have held that it is not.[158]

In 1987, the D.C. Circuit issued a decision that "definitively" resolved the issue by holding that the Trade Secrets Act does not satisfy either of amended Exemption 3's requirements and thus does not qualify as a separate withholding statute.[159] First, its prohibition against disclosure is not absolute, as it prohibits only those disclosures that are "not authorized by law."[160] Because duly promulgated agency regulations can provide the necessary authorization for release, the agency "possesses discretion to control the applicability" of the Act.[161] The existence of this discretion precludes the Trade Secrets Act from satisfying subpart (A) of Exemption 3.[162] Moreover, the court held that the Trade Secrets Act fails to satisfy the first prong of subpart (B) because it "in no way channels the discretion of agency decisionmakers."[163] Indeed, the court concluded, this utter lack of statutory guidance renders the Trade Secrets Act

---

[155] Id. at 11; see also FOIA Update, Spring 1988, at 1-2.

[156] 18 U.S.C. § 1905 (1994).

[157] Chrysler Corp. v. Brown, 441 U.S. 281, 319 n.49 (1979).

[158] See, e.g., Anderson v. HHS, 907 F.2d 936, 949 (10th Cir. 1990) ("[T]he broad and ill-defined wording of § 1905 fails to meet either of the requirements of Exemption 3."); Acumenics Research & Tech. v. United States Dep't of Justice, 843 F.2d 800, 805 n.6, 806 (4th Cir. 1988) (finding "no basis" for argument that Exemption 3 and § 1905 prevent disclosure of information that is outside scope of Exemption 4); General Elec. Co. v. NRC, 750 F.2d 1394, 1401-02 (7th Cir. 1984) (same); accord FOIA Update, Summer 1985, at 3 ("OIP Guidance: Discretionary Disclosure and Exemption 4"); see also 9 to 5 Org. of Women Office Workers v. Board of Governors of the Fed. Reserve Sys., 721 F.2d 1, 12 (1st Cir. 1983) (specifically declining to address issue).

[159] See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1137-43 (D.C. Cir. 1987).

[160] Id. at 1138.

[161] Id. at 1139.

[162] Id. at 1138.

[163] Id. at 1139.

susceptible to invocation at the "whim of an administrator."[164] Finally, it was held that the Act also fails to satisfy the second prong of subpart (B) because of the "encyclopedic character" of the material within its scope and the absence of any limitation on the agencies covered or the sources of data included.[165] Given all these elements, the court held that the Trade Secrets Act simply does not qualify as an Exemption 3 statute.[166] This followed the Department of Justice's stated policy position on the issue.[167]

The D.C. Circuit's decision on this issue is entirely consistent with the legislative history of the 1976 amendment to Exemption 3, which states that the Trade Secrets Act was not intended to qualify as a nondisclosure statute under the exemption and that any analysis of trade secrets and commercial or financial information should focus instead on the applicability of Exemption 4.[168] Some confidential business information, though, may be protected by the newly enacted National Defense Authorization Act.[169] This new statute provides blanket protection for the proposals of unsuccessful offerors submitted in response to a solicitation for a competitive proposal.[170] Under it, a successful offeror's proposal is also protected if it is not "set forth or incorporated by reference" in the final contract;[171] the key determinant of exempt status is whether the proposal was actually set forth in or incorporated into the contract.[172]

Lastly, a particularly controversial issue at one time was whether the Privacy Act of 1974[173] could serve as an Exemption 3 statute. The Privacy Act

---

[164] Id.

[165] Id. at 1140-41.

[166] Id. at 1141.

[167] See FOIA Update, Summer 1986, at 6 (advising agencies that Trade Secrets Act should not be regarded as Exemption 3 statute).

[168] See H.R. Rep. No. 94-880, at 23 (1976), reprinted in 1976 U.S.C.C.A.N. 2191, 2205; see also Anderson, 907 F.2d at 949-50; CNA, 830 F.2d at 1142 n.70; see also Acumenics, 843 F.2d at 805 n.6; General Elec., 750 F.2d at 1401-02; General Dynamics Corp. v. Marshall, 607 F.2d 234, 236-37 (8th Cir. 1979).

[169] National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 821, 110 Stat. 2422 (containing parallel measures applying to both armed services and certain civilian agencies) (to be codified at 10 U.S.C. § 2305(g) and 41 U.S.C. § 2536b(m)).

[170] Id.

[171] Id.; see FOIA Update, Winter 1997, at 2 (describing provisions of new statute, which have not yet been litigated for Exemption 3 applicability).

[172] See FOIA Update, Winter 1997, at 2.

[173] 5 U.S.C. § 552a (1994) (amended 1996, 5 U.S.C.A. § 552a (West Supp.

(continued...)

authorizes an individual to obtain access to those federal records maintained under the individual's name or personal identifier, subject to certain broad, system-wide exemptions.[174] If the Privacy Act had been regarded as an Exemption 3 statute, records exempt from disclosure to first-party requesters under the Privacy Act also would have been exempt under the FOIA; if not, requesters would have been able to obtain information on themselves under the FOIA notwithstanding that such information was exempt under the Privacy Act. In the early 1980's, the Department of Justice took the position that the Privacy Act was an Exemption 3 statute within the first-party requester context.[175] When a conflict subsequently arose among the circuits that considered the proper relationship between these two access statutes, the Supreme Court agreed to resolve the issue.[176] However, these cases became moot when Congress, upon enacting the Central Intelligence Agency Information Act in 1984, explicitly provided that the Privacy Act is not an Exemption 3 statute.[177] Thus, the Supreme Court dismissed the appeals in these cases and this issue has been placed entirely to rest.[178]

EXEMPTION 4

Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."[1] This exemption is intended to protect the interests of both the government and submitters of information. Its existence encourages submitters to voluntarily furnish useful commercial or financial information to the government and it correspondingly provides the government with an assurance that such information will be reliable. The exemption also affords protection to those submitters who are required to furnish commercial or financial information to the government by

---

[173](...continued)
1997)).

[174] See, e.g., 5 U.S.C. § 552a(j)(2).

[175] See FOIA Update, Spring 1983, at 3.

[176] Provenzano v. United States Dep't of Justice, 717 F.2d 799 (3d Cir. 1983), cert. granted, 466 U.S. 926 (1984); Shapiro v. DEA, 721 F.2d 215 (7th Cir. 1983), cert. granted, 466 U.S. 926 (1984).

[177] Pub. L. No. 98-477, § 2(c), 98 Stat. 2209, 2212 (1984) (amending what is now subsection (t) of Privacy Act).

[178] United States Dep't of Justice v. Provenzano, 469 U.S. 14 (1984); FOIA Update, Fall 1984, at 4. But see Hill v. Blevins, No. 92-0859 (M.D. Pa. Apr. 12, 1993) (incorrectly holding subsection (f)(3) of Privacy Act, which authorizes agency to establish procedures for disclosure of medical and psychological records, to be exempting statute under FOIA), aff'd, 19 F.3d 643 (3d Cir. 1994) (unpublished table decision).

[1] 5 U.S.C. § 552(b)(4) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997).

safeguarding them from the competitive disadvantages that could result from disclosure. The exemption covers two broad categories of information in federal agency records: (1) trade secrets; and (2) information which is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential.

Trade Secrets

For purposes of Exemption 4, the Court of Appeals for the District of Columbia Circuit in Public Citizen Health Research Group v. FDA,[2] has adopted a narrow "common law" definition of the term "trade secret" that differs from the broad definition used in the Restatement of Torts. The D.C. Circuit's decision in Public Citizen represented a distinct departure from what until then had been almost universally accepted by the courts--that "trade secret" is a broad term extending to virtually any information that provides a competitive advantage. In Public Citizen, the term "trade secret" was narrowly defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."[3] This definition requires that there be a "direct relationship" between the trade secret and the productive process.[4]

The Court of Appeals for the Tenth Circuit has expressly adopted the D.C. Circuit's narrow definition of the term "trade secret," finding it "more consistent with the policies behind the FOIA than the broad Restatement definition."[5] In so doing, the Tenth Circuit noted that adoption of the broader Restatement definition "would render superfluous" the remaining category of Exemption 4 information "because there would be no category of information falling within the latter"

---

[2] 704 F.2d 1280, 1288 (D.C. Cir. 1983).

[3] Id.

[4] Id.; see, e.g., Citizens Comm'n on Human Rights v. FDA, No. 92-5313, slip op. at 14 (C.D. Cal. May 10, 1993) ("information about how a pioneer drug product is formulated, chemically composed, manufactured, and quality controlled" held protectible as trade secrets), aff'd in part & remanded in part on other grounds, 45 F.3d 1325 (9th Cir. 1995); Pacific Sky Supply, Inc. v. Department of the Air Force, No. 86-2044, slip op. at 1-2 (D.D.C. Nov. 20, 1987) (design drawings of airplane fuel pumps developed by private company and used by Air Force held protectible as trade secrets), modifying (D.D.C. Sept. 29, 1987), on motion to amend judgment (D.D.C. Dec. 16, 1987); Yamamoto v. IRS, No. 83-2160, slip op. at 2 (D.D.C. Nov. 16, 1983) (report on computation of standard mileage rate prepared by private company and used by IRS held protectible as trade secret); cf. Myers v. Williams, No. 92-1609 (D. Or. Apr. 21, 1993) (preliminary injunction granted to prevent FOIA requester from disclosing trade secret acquired through mistaken, but nonetheless official, FOIA release) (non-FOIA case).

[5] Anderson v. HHS, 907 F.2d 936, 944 (10th Cir. 1990).

category that would be "outside" the reach of the trade secret category.[6] Like the D.C. Circuit, the Tenth Circuit was "reluctant to construe the FOIA in such a manner."[7]

This past year, the District Court for the District of Columbia, relying on the Public Citizen definition of the term "trade secret," rejected an agency's assertion of trade secret protection for "the common names and Chemical Abstract System (CAS) numbers of the inert ingredients" contained in six pesticide formulas, finding that disclosure of such "general identifying information about inert ingredients" simply would not reveal the actual formulas for the pesticides.[8]

Commercial or Financial Information

The overwhelming bulk of Exemption 4 cases focus on whether the withheld information falls within its second, much larger category. To do so, the information must be commercial or financial, obtained from a person, and privileged or confidential.[9]

If information relates to business or trade, courts have little difficulty in considering it "commercial or financial."[10] The Court of Appeals for the Dis

---

[6] Id.

[7] Id.

[8] Northwest Coalition for Alternatives to Pesticides v. Browner, 941 F. Supp. 197, 201-02 (D.D.C. 1996).

[9] See, e.g., Gulf & Western Indus. v. United States, 615 F.2d 527, 529 (D.C. Cir. 1979); Consumers Union v. VA, 301 F. Supp. 796, 802 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971).

[10] See, e.g., Cohen v. Kessler, No. 95-6140, slip op. at 9 (D.N.J. Nov. 25, 1996) ("rat study's raw data" submitted to support application for approval of new animal drug held "clearly commercial in nature" because data was "valuable to [submitter's] business activities"); Bangor Hydro-Elec. Co. v. United States Dep't of the Interior, No. 94-0173-B, slip op. at 7 (D. Me. Apr. 18, 1995) ("information relating to proposed [land] usage charges would be `financial' as that term is commonly understood"); Allnet Communication Servs. v. FCC, 800 F. Supp. 984, 988 (D.D.C. 1992), aff'd, No. 92-5351 (D.C. Cir. May 27, 1994); RMS Indus. v. DOD, No. C-92-1545, slip op. at 6 (N.D. Cal. Nov. 24, 1992) (requested "information is all financial because it directly reflects the financial capability of the companies to perform" a government contract and was obtained "in the bidding and award process"); ISC Group v. DOD, No. 88-631, slip op. at 7 (D.D.C. May 22, 1989); M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) (settlement negotiation documents reflecting "accounting and other internal procedures" deemed "commercial" as submitter had "commercial interest" in them); see also FOIA Update, Winter 1985, at 3-4 ("OIP Guidance: Protecting Intrinsic Commercial Value"); FOIA Update, Fall 1983, at 3-5 ("OIP Guidance: Copyrighted Materials and the FOIA"). But see Washington Research

(continued...)

trict of Columbia Circuit has firmly held that these terms should be given their "ordinary meanings" and has specifically rejected the argument that the term "commercial" be confined to records that "reveal basic commercial operations," holding instead that records are commercial so long as the submitter has a "commercial interest" in them.[11] Similarly, in a case involving information submitted by a labor union, the Court of Appeals for the Second Circuit held that the term "commercial" includes anything "pertaining or relating to or dealing with commerce."[12] Indeed, commercial information can include even material submitted by a nonprofit entity.[13]

Moreover, protection for financial information is not limited to economic data generated solely by corporations or other business entities, but rather has been held to apply to personal financial information as well.[14] Examples of items regarded as commercial or financial information include: business sales statistics; research data; technical designs; customer and supplier lists; profit and loss data; overhead and operating costs; and information on financial condition.[15]

(...continued)
Project, Inc. v. HEW, 504 F.2d 238, 244-45 (D.C. Cir. 1974) (scientific research designs submitted in grant applications not "commercial" absent showing that the research itself had any commercial character).

[11] Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing Washington Post Co. v. HHS, 690 F.2d 252, 266 (D.C. Cir. 1982); Board of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 403 (D.C. Cir. 1980)).

[12] American Airlines, Inc. v. National Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978); see also Hustead v. Norwood, 529 F. Supp. 323, 326 (S.D. Fla. 1981) ("information relating to the employment and unemployment of workers constitutes commercial or financial information"); Brockway v. Department of the Air Force, 370 F. Supp. 738, 740 (N.D. Iowa 1974) (reports generated by a commercial enterprise "must generally be considered commercial information"), rev'd on other grounds, 518 F.2d 1184 (8th Cir. 1975).

[13] See Critical Mass Energy Project v. NRC, 975 F.2d 871, 880 (D.C. Cir. 1992) (en banc) (safety reports submitted by nonprofit consortium of nuclear power plants deemed "commercial in nature"); see also Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 398 (5th Cir. 1985) (audit reports submitted by nonprofit water supply company deemed "clearly commercial"); American Airlines, 588 F.2d at 870 (employee "authorization cards" submitted by nonprofit union deemed "commercial").

[14] See Washington Post, 690 F.2d at 266; FOIA Update, Fall 1983, at 14. But see Washington Post, 690 F.2d at 266 (list of nonfederal employment positions held not "financial" within meaning of Exemption 4).

[15] See, e.g., Landfair v. United States Dep't of the Army, 645 F. Supp. 325, 327 (D.D.C. 1986).

Obtained from a "Person"

The second of Exemption 4's specific criteria, that the information be "obtained from a person," is quite easily met in almost all circumstances. The term "person" refers to a wide range of entities,[16] including corporations, state governments, agencies of foreign governments, and Native American tribes or nations.[17] The courts have held, however, that information generated by the federal government is not "obtained from a person" and is therefore excluded from Exemption 4's coverage.[18] Such information might possibly be protectible under Exemption 5, though, which incorporates a qualified privilege for sensitive commercial or financial information generated by the government.[19] (For a further discussion of the "commercial privilege," see Exemption 5, Other Privileges, below.)

Documents prepared by the government can still come within Exemption 4, however, if they simply contain summaries or reformulations of information

---

[16] See, e.g., Nadler v. FDIC, 92 F.3d 93, 95 (2d Cir. 1996) (term "person" includes "`an individual, partnership, corporation, association, or public or private organization other than an agency'" (quoting definition found in Administrative Procedure Act, 5 U.S.C. § 551(2) (1994))); Goldstein v. HHS, No. 92-2013, slip op. at 4 (S.D. Fla. May 21, 1993) (magistrate's recommendation) ("the term `person' encompasses individuals, partnerships, corporations, and associations" (likewise quoting Administrative Procedure Act definition)), adopted (S.D. Fla. July 21, 1993).

[17] See, e.g., Comstock Int'l, Inc. v. Export-Import Bank, 464 F. Supp. 804, 806 (D.D.C. 1979) (corporation); Hustead v. Norwood, 529 F. Supp. 323, 326 (S.D. Fla. 1981) (state government); Stone v. Export-Import Bank, 552 F.2d 132, 137 (5th Cir. 1977) (foreign government agency); see also Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769, 776 (D.D.C. 1974) (foreign government or instrumentality); Bangor Hydro-Elec. Co. v. United States Dep't of the Interior, No. 94-0173-B, slip op. at 7 (D. Me. Apr. 18, 1995) ("parties do not contest that the Penobscot Nation is a `person' for purposes of exemption 4" (citing Indian Law Resource Ctr. v. Department of the Interior, 477 F. Supp. 144, 146 (D.D.C. 1979) ("The Hopi Tribe, as a corporation that is not part of the Federal Government, is plainly a person within the meaning of the Act."))).

[18] See Allnet Communication Servs. v. FCC, 800 F. Supp. 984, 988 (D.D.C. 1992) ("person" under Exemption 4 "refers to a wide range of entities including corporations, associations and public or private organizations other than agencies"), aff'd, No. 92-5351 (D.C. Cir. May 27, 1994); see also, e.g., Board of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 404 (D.C. Cir. 1980); Buffalo Evening News, Inc. v. SBA, 666 F. Supp. 467, 469 (W.D.N.Y. 1987); Consumers Union v. VA, 301 F. Supp. 796, 803 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971).

[19] See Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360 (1979); accord Morrison-Knudsen Co. v. Department of the Army of the United States, 595 F. Supp. 352, 354-56 (D.D.C. 1984), aff'd, 762 F.2d 138 (D.C. Cir. 1985).

supplied by a source outside the government.[20] Moreover, the mere fact that the government supervises or directs the preparation of information submitted by sources outside the government does not preclude that information from being "obtained from a person."[21]

"Confidential" Information

The third requirement of Exemption 4 is met if information is "privileged or confidential." By far, most Exemption 4 litigation has focused on whether or not requested information is "confidential" for purposes of Exemption 4. In earlier years, courts based the application of Exemption 4 upon whether there was a promise of confidentiality by the government to the submitting party,[22] or whether the information was of the type not customarily released to the public by the submitter.[23]

These earlier tests were then superseded by the rule of National Parks & Conservation Ass'n v. Morton,[24] long considered to be the leading case on the issue, which significantly altered the test for confidentiality under Exemption 4. In National Parks, the Court of Appeals for the District of Columbia Circuit held that the test for confidentiality was an objective one.[25] Thus, whether information would customarily be disclosed to the public by the person from whom it was

---

[20] See, e.g., Gulf & Western Indus. v. United States, 615 F.2d 527, 529-30 (D.C. Cir. 1979) (contractor information contained in agency audit report); Matthews v. United States Postal Serv., No. 92-1208-CV-W-8, slip op. at 6 (W.D. Mo. Apr. 15, 1994) (technical drawings prepared by agency personnel, but based upon information supplied by computer company); Mulloy v. Consumer Prod. Safety Comm'n, No. 85-645, slip op. at 2 (S.D. Ohio Aug. 2, 1985) (manufacturing and sales data compiled in Establishment Inspection Report prepared by Commission investigator after on-site visit to plant), aff'd, No. 85-3720 (6th Cir. July 22, 1986); BDM Corp. v. SBA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,044, at 81,121 (D.D.C. Dec. 4, 1980) (contractor information contained in agency documents).

[21] See Silverberg v. HHS, No. 89-2743, slip op. at 6 (D.D.C. June 14, 1991), appeal dismissed per stipulation, No. 91-5255 (D.C. Cir. Sept. 2, 1993); Daniels Mfg. Corp. v. DOD, No. 85-291, slip op. at 4 (M.D. Fla. June 3, 1986). But see Consumers Union, 301 F. Supp. at 803 (when product testing was actually performed by government personnel, using their expertise and government equipment, resulting data held not "obtained from a person" for purposes of Exemption 4).

[22] See, e.g., GSA v. Benson, 415 F.2d 878, 881 (9th Cir. 1969).

[23] See, e.g., Sterling Drug, Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971); M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467, 471 (D.D.C. 1972).

[24] 498 F.2d 765 (D.C. Cir. 1974).

[25] Id. at 766.

obtained was not considered dispositive.[26] Likewise, an agency's promise that information would not be released was not considered dispositive.[27] Instead, the D.C. Circuit declared in National Parks that the term "confidential" should be read to protect governmental interests as well as private ones, according to the following two-part test:

> To summarize, commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.[28]

These two principal Exemption 4 tests, which apply disjunctively, have often been referred to in subsequent cases as the "impairment prong" and the "competitive harm prong." In National Parks, the D.C. Circuit expressly reserved the question of whether any other governmental interests--such as compliance or program effectiveness--might also be embodied in a "third prong" of the exemption.[29] (For a further discussion of this point, see Exemption 4, Third Prong of National Parks, below.)

Five years ago, in a surprising development, D.C. Circuit Court Judge Randolph, joined by Circuit Court Judge Williams, suggested in a concurring opinion in Critical Mass Energy Project v. NRC, that if it were a question of first impression, they would "apply the common meaning of [the word] `confidential' and [would] reject" the National Parks test altogether.[30] Judges Randolph and Williams contended that there was no "legitimate basis" for the D.C. Circuit's addition of "some two-pronged `objective' test" for determining if material was "confidential" in light of the unambiguous language of the exemption.[31] Nevertheless, they recognized that they "were not at liberty" to apply their "common sense" definition because the D.C. Circuit had "endorsed the National Parks definition many times," thus compelling them to follow it as well.[32] Accordingly, the government petitioned for, and was granted, an en banc rehearing in Critical

---

[26] Id. at 767.

[27] See Washington Post Co. v. HHS, 690 F.2d 252, 268 (D.C. Cir. 1982) (citing National Parks, 498 F.2d at 766).

[28] 498 F.2d at 770.

[29] Id. at 770 n.17.

[30] 931 F.2d 939, 948 (D.C. Cir.) (Randolph & Williams, JJ., concurring), vacated & reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992).

[31] 931 F.2d at 948.

[32] Id.

Mass[33] so that the full D.C. Circuit could have an opportunity to consider whether the definition of confidentiality set forth in National Parks--and followed by the panel majority in Critical Mass--was indeed faithful to the language and legislative intent of Exemption 4.[34]

In August of 1992, the D.C. Circuit issued its en banc decision in Critical Mass. After examining the "arguments in favor of overturning National Parks, [the court] conclude[d] that none justifies the abandonment of so well established a precedent."[35] This ruling was founded on the principle of stare decisis--which counsels against the overruling of an established precedent.[36] The D.C. Circuit determined that "[i]n obedience to" stare decisis, it would not "set aside circuit precedent of almost twenty years' standing."[37] In so holding, it noted the "widespread acceptance of National Parks by [the] other circuits," the lack of any subsequent action by Congress that would remove the "`conceptual underpinnings'" of the decision, and the fact that the test had not proven to be "so flawed that [the court] would be justified in setting it aside."[38]

Although the National Parks test for confidentiality under Exemption 4 was thus reaffirmed, the full D.C. Circuit went on to "correct some misunderstandings as to its scope and application."[39] Specifically, the court "confined" the reach of National Parks and established an entirely new standard to be used for determining whether information "voluntarily" submitted to an agency is "confidential."[40] The United States Supreme Court declined to review the D.C. Circuit's en banc decision[41] and it now stands as the leading Exemption 4 case on this issue.[42]

The Critical Mass Decision

Through its en banc decision in Critical Mass Energy Project v. NRC, a seven-to-four majority of the Court of Appeals for the District of Columbia Circuit established two distinct standards to be used in determining whether com-

---

[33] 942 F.2d 799 (D.C. Cir. 1991).

[34] See FOIA Update, Fall 1992, at 1.

[35] 975 F.2d 871, 877 (D.C. Cir. 1992).

[36] See id. at 875.

[37] Id.

[38] Id. at 876-77 (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989)).

[39] Id. at 875.

[40] Id. at 871, 879.

[41] 507 U.S. 984 (1993).

[42] See FOIA Update, Spring 1993, at 1.

mercial or financial information submitted to an agency is "confidential" under Exemption 4.[43] Specifically, the tests for confidentiality set forth in National Parks & Conservation Ass'n v. Morton,[44] were confined "to the category of cases to which [they were] first applied; namely, those in which a FOIA request is made for financial or commercial information a person was obliged to furnish the Government."[45] The D.C. Circuit announced an entirely new test for the protection of information that is "voluntarily" submitted: Such information is now categorically protected provided it is not "customarily" disclosed to the public by the submitter.[46]

In reaching this result, the D.C. Circuit first examined the bases for its decision in National Parks and then identified various interests of both the government and submitters of information that are protected by Exemption 4.[47] By so doing, it found that different interests are implicated depending upon whether the requested information was submitted voluntarily or under compulsion.[48] As to the government's interests, the D.C. Circuit found, when submission of the information is "compelled" by the government the interest protected by nondisclosure is that of ensuring the continued reliability of the information.[49] On the other hand, it concluded, when information is submitted on a "voluntary" basis, the governmental interest protected by nondisclosure is that of ensuring the continued and full availability of the information.[50]

The D.C. Circuit found that this same dichotomy between compelled and voluntary submissions applies to the submitter's interests as well: When submission of information is compelled, the harm to the submitter's interest is the "commercial disadvantage" that is recognized under the National Parks "competitive injury" prong.[51] When information is volunteered, on the other hand, the exemption recognizes a different interest of the submitter--that of protecting information that "for whatever reason, `would customarily not be released to the

---

[43] 975 F.2d 871, 879 (D.C. Cir. 1992).

[44] 498 F.2d 765, 770 (D.C. Cir. 1974).

[45] 975 F.2d at 880.

[46] Id. at 879; accord Bartholdi Cable Co. v. FCC, 114 F.3d 274, 281 (D.C. Cir. 1997) ("The test for whether information is `confidential' depends in part on whether the information was voluntarily or involuntarily disclosed to the government.") (non-FOIA case brought under Administrative Procedure Act).

[47] Critical Mass, 975 F.2d at 877-79.

[48] Id.

[49] Id. at 878.

[50] Id.

[51] Id.

public by the person from whom it was obtained.'"[52]

Having delineated these various interests that are protected by Exemption 4, the D.C. Circuit then noted that the Supreme Court had "encouraged the development of categorical rules" in FOIA cases "whenever a particular set of facts will lead to a generally predictable application."[53] The court found that the circumstances of the Critical Mass case--which involved voluntarily submitted reports--lent themselves to such "categorical" treatment.[54]

Accordingly, the D.C. Circuit held that it was reaffirming the National Parks test for "determining the confidentiality of information submitted under compulsion," but was announcing a categorical rule for the protection of information provided on a voluntary basis.[55] It declared that such voluntarily provided information is "`confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained."[56] It also emphasized that this categorical test for voluntarily submitted information is "objective" and that the agency invoking it "must meet the burden of proving the provider's custom."[57]

Applying this test to the information at issue in the Critical Mass case, the D.C. Circuit agreed with the district court's conclusion that the reports were commercial in nature, that they were provided to the agency on a voluntary basis, and that the submitter did not customarily release them to the public.[58] Thus, the reports were found to be confidential and exempt from disclosure under this new test for Exemption 4.[59]

The D.C. Circuit concluded its opinion by observing the objection raised by the requester in the case that the new test announced by the court "may lead gov-

---

[52] Id. (citing Sterling Drug, Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971)).

[53] Id. at 879 (citing United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989)).

[54] Id.

[55] Id.

[56] Id. But see Lee v. FDIC, 923 F. Supp. 451, 454 (S.D.N.Y. 1996) (misstating (and consequently misapplying) Critical Mass test for withholding voluntary submissions as including additional requirement that "disclosure would likely impair the government's ability to obtain necessary information in the future").

[57] 975 F.2d at 879.

[58] Id. at 880 (citing first district court decision and first panel decision in Critical Mass, which recognized that submitter made reports available on confidential basis to individuals and organizations involved in nuclear power production process pursuant to explicit nondisclosure policy).

[59] Id.

ernment agencies and industry to conspire to keep information from the public by agreeing to the voluntary submission of information that the agency has the power to compel."[60] The court dismissed this objection on the grounds that there is "no provision in FOIA that obliges agencies to exercise their regulatory authority in a manner that will maximize the amount of information that will be made available to the public through that Act" and that it did not "see any reason to interfere" with an agency's "exercise of its own discretion in determining how it can best secure the information it needs."[61]

Applying Critical Mass

The pivotal issue that has arisen as a result of the decision in Critical Mass Energy Project v. NRC,[62] is the distinction that the court drew between information "required" to be submitted to an agency and information provided "voluntarily." Although the Court of Appeals for the District of Columbia Circuit never expressly articulated a definition of these two terms in its opinion in Critical Mass, the Department of Justice has issued policy guidance on this subject based upon an extensive analysis of the underlying rationale of the D.C. Circuit's decision, as well as several other indications of the court's intent.[63]

The Department of Justice has concluded that a submitter's voluntary participation in an activity--such as seeking a government contract or applying for a grant or a loan--does not govern whether any submissions made in connection with that activity are likewise "voluntary."[64] Rather than examining the nature of a submitter's participation in an activity, agencies are advised to focus on whether submission of the information at issue was required by those who chose to

---

[60] Id.

[61] Id.; see Animal Legal Defense Fund v. Secretary of Agric., 813 F. Supp. 882, 892 (D.D.C. 1993) (based upon this holding in Critical Mass, court found that there was "nothing" it could do, "however much it might be inclined to do so," to upset agency regulations that permitted regulated entities to keep documents "on-site," outside possession of agency, and thus unreachable under FOIA) (non-FOIA case brought under Administrative Procedure Act), vacated for lack of standing sub nom. Animal Legal Defense Fund, Inc. v. Espy, 53 F.3d 363 (D.C. Cir. 1994).

[62] 975 F.2d 871 (D.C. Cir. 1992) (en banc).

[63] See FOIA Update, Spring 1993, at 3-5 ("OIP Guidance: The Critical Mass Distinction Under Exemption 4"); see also id. at 6-7 ("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking"); accord McDonnell Douglas Corp. v. NASA, 895 F. Supp. 316, 317-18 (D.D.C. 1995) (noting that "[a]lthough no bright line rule exists for determining voluntariness, examination of the Critical Mass opinion sheds light on the type of information the D.C. Circuit Court contemplated as being voluntary") (reverse FOIA suit), aff'd on other grounds, No. 95-5290 (D.C. Cir. Sept. 17, 1996).

[64] See FOIA Update, Spring 1993, at 5.

participate.[65] The Department of Justice's policy guidance also points out that information can be "required" to be submitted by a broad range of legal authorities, including informal mandates that call for submission as a condition of doing business with the government.[66] Furthermore, the existence of agency authority to require submission of information does not automatically mean such a submission is "required"; the agency authority must actually be exercised in order for a particular submission to be deemed "required."[67] The net effect under this guidance is that most submissions considered by agencies under Exemption 4 will be considered to be "required" and so will not qualify for the broader protection afforded to "voluntary" submissions under Critical Mass.[68]

There now have been numerous cases in which courts have applied the Critical Mass distinction between "voluntary" and "required" submissions. In one of the first such cases, involving an application for approval to transfer a contract, the District Court for the District of Columbia found that the submission had been required both by the agency's statute--which did not, on its face, apply to the submission at issue, but was found to apply based upon the agency's longstanding practice of interpreting the statute more broadly--and by the agency's letter to the submitters which required them to "submit the documents as a condition necessary to receiving approval of their application."[69] Using the same approach as the Department of Justice's Critical Mass guidance, the court specifically held that "[u]nder Critical Mass, submissions that are required to realize the benefits of a voluntary program are to be considered mandatory."[70] Similarly, when the FDA conditioned its approval of a new drug on the manufacturer's submission of a post-marketing study, the protocol for that study (i.e., its design, hypotheses, and objectives) was deemed a required submission--even in the absence of agency regulations requiring manufacturers to conduct such post-marketing studies--

---

[65] See id.; see also id. at 1 (pointing to significance of this guidance to procurement process and its development in coordination with Office of Federal Procurement Policy).

[66] See id.; accord Lykes Bros. S.S. Co. v. Pena, No. 92-2780, slip op. at 8-11 (D.D.C. Sept. 2, 1993) (submission "compelled" both by agency statute and by agency letter sent to submitters) (reverse FOIA suit).

[67] See FOIA Update, Spring 1993, at 5; accord Government Accountability Project v. NRC, No. 86-1976, slip op. at 12 (D.D.C. July 2, 1993) (dicta).

[68] See FOIA Update, Spring 1993, at 1; accord Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (Oct. 4, 1993), reprinted in FOIA Update, Summer/Fall 1993, at 4-5 (establishing "foreseeable harm" standard governing use of FOIA exemptions); see also FOIA Update, Spring 1994, at 3.

[69] Lykes, No. 92-2780, slip op. at 9 (D.D.C. Sept. 2, 1993).

[70] Id.; accord FOIA Update, Spring 1993, at 3-5; see also Lee v. FDIC, 923 F. Supp. 451, 454 (S.D.N.Y. 1996) (when documents were "required to be submitted" in order to get government approval to merge two banks, court rejects agency's attempt to nonetheless characterize submission as "voluntary").

because submission for that particular manufacturer had, in fact, been "necessary in order to obtain FDA approval" for the drug and that rendered it "required."[71]

In another case which also used the same approach as the Department of Justice's Critical Mass guidance, the District Court for the District of New Jersey found that when a submitter provided documents to agency officials during a meeting concerning its tax status, it did so voluntarily, because "if the submission of the documents were obligatory, there would be a controlling statute, regulation or written order."[72] In the absence of any such "mandate," the court concluded that the submission was voluntary.[73]

In that case, the court rejected an argument advanced by the requester that despite the absence of a mandate requiring the submission, the court should "rule as a matter of law" that the documents were "required" to be submitted because submission was for the "benefit" of the submitter.[74] Finding that such an approach "results in putting the cart before the horse," the court noted that in Critical Mass, the D.C. Circuit decided first whether a submission was voluntary and only then did it apply the "less stringent standard for nondisclosure under the FOIA as an incentive for voluntary submitters to provide accurate and reliable information."[75] The requester's proposed test was "flawed," the court found, because it relied "too heavily on hindsight" and the court could "envision cases where someone at the time of submitting the documents is clearly doing so on a voluntary basis, but when a benefit analysis . . . is performed thereafter, the incorrect result is reached that the submission was compulsory."[76]

A submission was found to be "voluntary" in another case where the requester sought copies of the comments a submitter had provided the agency in response to the notice it had been given concerning a FOIA request that had been made for its information.[77] In finding that such comments had been "voluntarily submitted" to the agency, the court focused on the agency's submitter-notice regulations and found that they "clearly did not require . . . [the submitter] to

---

[71] Public Citizen Health Research Group v. FDA, 964 F. Supp. 413, 414 n.1 (D.D.C. 1997).

[72] AGS Computers, Inc. v. United States Dep't of Treasury, No. 92-2714, slip op. at 10 (D.N.J. Sept. 16, 1993).

[73] Id. at 9, 10.

[74] Id. at 10.

[75] Id.

[76] Id. at 10-11.

[77] McDonnell Douglas Corp. v. NASA, No. 93-1540, slip op. at 2 (D.D.C. Nov. 17, 1993) (reverse FOIA suit).

provide any comments whatsoever."[78] The court noted that under those regulations, the failure to submit objections to the disclosure of requested information did "not constitute a waiver" and that the agency was still obligated to review the information to determine whether release was appropriate.[79] The court went on to note that "[t]he regulations do prescribe the content of any comments submitted, but they in no way require the submission of comments."[80] The court thus utilized, without reference to any authority, an approach that is inconsistent with the Department of Justice's Critical Mass guidance--perhaps because its ruling was primarily influenced by what the court perceived as the relatively weak "requirement" for submission embodied in the agency's submitter-notice regulations.[81]

In a second case that turned on the wording of an agency's regulation, the same court found that the agency had demonstrated that the submission of information by kidney dialysis centers was voluntary and that the regulation relied on by the requester--in support of its contention that the submission was required--did not actually "require" the centers "to provide any particular information" and instead merely stated, "without further elaboration," that information "must be provided in the manner specified" by the agency's Secretary.[82] In that regard, the court found persuasive the agency's declaration that stated "unequivocally that the information was produced voluntarily and not subject to a statutory requirement."[83]

In a ruling that arguably takes the characterization of "voluntary" to its outermost reaches, the District Court for the Eastern District of Missouri held that a submission was voluntary even though the agency not only had the authority to issue a subpoena for the documents, but had in fact exercised that authority by actually issuing such a subpoena.[84] The court flatly rejected the agency's argument that the issuance of the subpoena rendered the submission "required," finding that that "conclusion ignore[d] the fact that subpoenaed parties may challenge [the subpoena], both administratively and through objections to enforcement proceedings."[85] Although no challenge to the subpoena was actually brought, the court found it "highly likely" that such a challenge would have been successful given the fact that the court had previously ruled that the same

---

[78] Id.

[79] Id. at n.1.

[80] Id.

[81] See id. at 2 & n.1.

[82] Minntech Corp. v. HHS, No. 92-2720, slip op. at 8 (D.D.C. Nov. 17, 1993).

[83] Id.

[84] McDonnell Douglas Corp. v. EEOC, 922 F. Supp. 235, 242 (E.D. Mo. 1996) (reverse FOIA suit), appeal dismissed, No. 96-2662 (8th Cir. Aug. 29, 1996).

[85] Id.

documents were privileged and hence did not have to be disclosed to private parties who were in litigation with the submitter.[86] "This," the court declared, "shows that the production in fact was voluntary, not required."[87]

Significantly, the District Court for the District of Columbia has issued five decisions which all hold--consistent with the approach taken in the Department of Justice's policy guidance on this issue--that prices submitted in conjunction with a government contract are "required" submissions.[88] In the first of these decisions, the court held that the submitter "had no choice but to submit the unit price information once it chose to submit its proposal," as the terms of the Request for Proposals (RFP) "compelled [it] to submit its unit prices."[89] Relying on that decision, the court reiterated in the next case that a contract "bidder only provides confidential information because the agency requires it [and that] once a firm has elected to bid, it must submit the mandatory information if it hopes to win the contract."[90]

In the third decision, the court again relied on the terms of the agency's RFP which, it noted, "used language of compulsion in reference to pricing information."[91] There, the court also rejected as "temptingly simple" the submitter's argument that because it "did not have to enter into a contract, no information within the contract [should] be considered mandatory."[92] This "rather simplistic approach" was flatly rejected by the court as it "would result in classifying all government contractors as per se volunteers whose pricing information could easily be withheld from the public domain."[93]

In the fourth decision, after analyzing the Critical Mass decision, the court expressly concluded "as a matter of law" that "the price elements necessary to

---

[86] Id.

[87] Id.

[88] Martin Marietta Corp. v. Dalton, No. 94-2702, 1997 WL 459831, at *2 (D.D.C. Aug. 8, 1997) (reverse FOIA suit); McDonnell Douglas, 895 F. Supp. at 317-18; McDonnell Douglas Corp. v. NASA, 895 F. Supp. 319, 325-26 (D.D.C. 1995) (reverse FOIA suit), vacated as moot, No. 95-5288 (D.C. Cir. Apr. 1, 1996); CC Distribs. v. Kinzinger, No. 94-1330, slip op. at 8-9 (D.D.C. June 28, 1995) (reverse FOIA suit); Chemical Waste Management, Inc. v. O'Leary, No. 94-2230, slip op. at 8-9 (D.D.C. Feb. 28, 1995) (reverse FOIA suit).

[89] Chemical Waste, No. 94-2230, slip op. at 8 (D.D.C. Feb. 28, 1995).

[90] CC Distribs., No. 94-1330, slip op. at 8-9 (D.D.C. June 28, 1995).

[91] McDonnell Douglas, 895 F. Supp. at 325.

[92] Id.

[93] Id.

win a government contract are not voluntary."[94] Once again faced with an argument by the submitter that its submission of a proposal and its entry into a government contract were "obviously voluntary acts," the court found that such contentions were simply "inapposite."[95] Declaring that "no one disputes that the process of offer and acceptance giving rise to contractual obligations is voluntary," the court held that the "focal point" must be "the information itself" and that there was no question that the agency "required that the contract itemize the prices for specific services."[96] The court then went on to somewhat sarcastically note that the submitter was "not doing the government a favor by providing the most basic information in a contract--price," and observed that if "contractors want to win lucrative government contracts they must provide [agencies] with specific pricing elements for their goods and services."[97]

Finally, in the last of these decisions, the court held that although the D.C. Circuit "has yet to address the issue, district court precedent in this Circuit uniformly and firmly points to the conclusion that the financial/commercial information found in the [submitter's] contracts was `required' in the National Parks sense of the term by Federal Acquisition Regulations . . . and therefore [was] subject to the National Parks test."[98] In so holding, the district court again noted that "[w]hether to compete for [the agency's] business at all was, of course, [the submitter's] option, but having elected to do so it was required to submit the information [the agency] insisted on having if it hoped to win the contract."[99]

The District Court for the District of Colorado likewise has ruled that a contract submission was "not voluntarily provided" and that, as a consequence, the greater protection afforded by Critical Mass for such submissions was not applicable.[100] In so holding, the court there also specifically rejected the argument advanced by the submitter that because it had "voluntarily entered into the contract with the Government" the contract submission should be considered "voluntary."[101] In contrast, two cases decided in the Eastern District of Virginia in the immediate aftermath of Critical Mass reached the opposite conclusion and held

---

[94] McDonnell Douglas, 895 F. Supp. at 318.

[95] Id.

[96] Id.

[97] Id.

[98] Martin Marietta, 1997 WL 459831, at *2.

[99] Id.

[100] Source One Management, Inc. v. United States Dep't of the Interior, No. 92-Z-2101, transcript at 6 (D. Colo. Nov. 10, 1993) (bench order) (reverse FOIA suit).

[101] Id. at 5.

that contract submissions were voluntarily provided.[102] (As noted below, however, one of those cases was later expressly disclaimed by a subsequent court in that same district for failing to provide any justification whatsoever for its conclusion.[103])

A case involving government contract prices did reach the D.C. Circuit--after having been decided by the lower court prior to the Critical Mass decision--but the D.C. Circuit elected not to opine on the meaning of its decision in Critical Mass, or its applicability to government contract submissions, and instead remanded the case to the district court with instructions for that court to "reexamine the applicability of exemption 4 to the contract prices at issue under our holding in Critical Mass."[104] (On remand, the district court found Critical Mass to be inapplicable to a government contract submission.[105]) Similarly, another case was remanded back to the agency--which had made its Exemption 4 determination prior to the issuance of Critical Mass--so that any voluntarily submitted information could be identified and then analyzed under the Critical Mass standards.[106]

In the first decision of its kind, the District Court for the District of Columbia differentiated between discrete items contained in a government contract and found that General and Administrative (G & A) rate ceilings were voluntarily provided to the government even though submission of actual G & A rates was "undisputed[ly] . . . a mandatory component" of an offeror's submission.[107] In so holding, the court rejected the agency's argument that because "submission of a cost proposal, including actual G & A rates was mandatory in order to compete for the contract," the G & A rate ceilings--which had been requested by the contracting officer during negotiations--"were also a mandatory part of the cost

---

[102] Environmental Tech., 822 F. Supp. at 1229 (summarily declaring that unit price information provided in connection with government contract was voluntarily submitted); Cohen, Dunn & Sinclair, P.C. v. GSA, No. 92-0057-A, transcript at 28 (E.D. Va. Sept. 10, 1992) (bench order) (same).

[103] Comdisco, Inc. v. GSA, 864 F. Supp. 510, 517 n.8 (E.D. Va. 1994) (reverse FOIA suit) (denigrating Environmental Tech., Inc. v. EPA, 822 F. Supp. 1226, 1229 (E.D. Va. 1993) (reverse FOIA suit)); accord FOIA Update, Spring 1993, at 5 (same).

[104] McDonnell Douglas Corp. v. NASA, No. 92-5342, slip op. at 2 (D.C. Cir. Feb. 14, 1994).

[105] McDonnell Douglas, 895 F. Supp. at 318.

[106] Alexander & Alexander Servs. v. SEC, No. 92-1112, slip op. at 17 (D.D.C. Oct. 19, 1993) (reverse FOIA suit), appeal dismissed, No. 93-5398 (D.C. Cir. Jan. 4, 1996).

[107] Cortez III Serv. Corp. v. NASA, 921 F. Supp. 8, 12 (D.D.C. 1996) (reverse FOIA suit), appeal dismissed voluntarily, No. 96-5163 (D.C. Cir. July 3, 1996).

proposal."[108] Because the contract solicitation was "silent as to G & A rate ceilings," and in the absence of any firm evidence that the submitter "was required to provide G & A rate ceilings in order to continue to compete for the contract," the court concluded that their submission had been voluntary.[109]

There have been other cases decided subsequent to Critical Mass that have applied the new voluntary/required distinction, but they have done so without setting forth any rationale or analysis for their conclusions on this pivotal issue. Instead, the information at issue was summarily found either to have been voluntarily provided[110] or, conversely, to have been required to be submitted.[111] The D.C. Circuit had occasion to review one of these cases on appeal, but its unpublished opinion did not provide any further guidance on the Critical Mass distinction and instead merely affirmed the lower court's already terse decision on that point.[112]

In a case involving rather unusual factual circumstances, the District Court for the District of Columbia discussed the applicability of the Critical Mass distinction to documents that had been provided to the agency not by their originator, but as a result of the unauthorized action of a confidential source.[113] Although these documents were not actually at issue in the case, the court nevertheless elected to analyze their status under Critical Mass.[114] The court first noted that the decision in Critical Mass provided it with "little guidance" as those documents "had been produced voluntarily by the originator, without any

---

[108] Id.

[109] Id. at 12-13.

[110] See Thomas v. Weise, No. 91-3278, slip op. at 6 (D.D.C. Oct. 7, 1994) (requester did "not dispute that the documents were voluntarily submitted"); All-net Communication Servs. v. FCC, 800 F. Supp. 984, 990 (D.D.C. 1992) ("[t]o the extent that the information sought was submitted voluntarily, the material was properly withheld"), aff'd, No. 92-5351, slip op. at 3 (D.C. Cir. May 27, 1994).

[111] See Africa Fund v. Mosbacher, No. 92-289, slip op. at 15-16 & n.3 (S.D.N.Y. May 26, 1993) (information concerning export license applications required to be submitted); Citizens Comm'n on Human Rights v. FDA, No. 92-5313, slip op. at 15 (C.D. Cal. May 10, 1993) (information concerning New Drug Application required to be submitted), aff'd in part & remanded in part on other grounds, 45 F.3d 1325 (9th Cir. 1995).

[112] Allnet Communications Servs. v. FCC, No. 92-5351, slip op. at 3 (D.C. Cir. May 27, 1994) (finding no error in lower court first concluding that requested information was exempt under standard for required submissions and then also concluding that it would be exempt under standard for voluntary submissions).

[113] Government Accountability, No. 86-1976, slip op. at 2 (D.D.C. July 2, 1993).

[114] Id. at 10.

intervening espionage."[115] The court nevertheless opined that in its case "the secret, unauthorized delivery" of the documents at issue made the submission "`involuntary' in the purest sense," but that application of the "more stringent standard for involuntary transfer would contravene the spirit" of Critical Mass.[116] Thus, the court declared that in such circumstances the proper test for determining the confidentiality of the documents should be the "more permissive standard" of Critical Mass, i.e., protection would be afforded if the information was of a kind that is not customarily released to the public by the submitter.[117]

Interestingly, the District Courts for the District of Maine and the Eastern District of Virginia both have expressly declined to consider the possible applicability of Critical Mass to the information at issue because the Critical Mass distinction has not yet been adopted by their respective courts of appeal.[118] In so holding, the District Court for the Eastern District of Virginia noted that although a previous decision arising out of that same district had, in fact, "adopted the Critical Mass test," that earlier opinion "provided little justification for its conclusion" and the court "decline[d] to follow" it.[119]

Using a slightly different approach, the District Court for the Southern District of New York declared that it "need not decide whether Critical Mass is governing law in the Second Circuit" because the records at issue--which were acquired by the FDIC by operation of law when it became receiver of a failed financial institution--were "not produced voluntarily [and so] the Critical Mass standard simply [did] not apply."[120] On appeal, the Court of Appeals for the Second Circuit agreed with the lower court on this point, stating that because the records at issue were not provided voluntarily, the Critical Mass test was "irrelevant to the issue presented" by the appeal.[121] Similarly, the Court of Appeals for the Ninth Circuit recently observed that the Critical Mass distinction between voluntary and required submissions "becomes relevant only when information is submitted to the government voluntarily."[122] Finding that the records at issue in the case before it were required to be submitted by the terms of

---

[115] Id. at 11-12.

[116] Id. at 12.

[117] Id.; see also id. at 11 (citing Critical Mass, 975 F.2d at 879).

[118] Bangor Hydro-Elec. Co. v. United States Dep't of the Interior, No. 94-0173-B, slip op. at 9 n.3 (D. Me. Apr. 18, 1995); Comdisco, 864 F. Supp. at 517-19.

[119] Comdisco, 864 F. Supp. at 517 n.8 (referring to Environmental Tech., 822 F. Supp. at 122).

[120] Nadler v. FDIC, 899 F. Supp. 158, 161 (S.D.N.Y. 1995), aff'd, 92 F.3d 93 (2d Cir. 1996).

[121] Nadler v. FDIC, 92 F.3d 93, 96 n.1 (2d Cir. 1996).

[122] Frazee v. United States Forest Serv., 97 F.3d 367, 372 (9th Cir. 1996) (reverse FOIA suit).

the agency's contract solicitation, the Ninth Circuit declared that in light of that fact, it "need not address" the Critical Mass distinction.[123]

Under Critical Mass, once information is determined to be voluntarily provided, it is afforded protection as "confidential" information "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained."[124] The D.C. Circuit observed in Critical Mass that this test was "objective" and that the agency invoking it "must meet the burden of proving the provider's custom."[125] The subsequent cases that have applied this "customary treatment" standard to information found to have been voluntarily submitted typically contain only perfunctory discussions of the showing necessary to satisfy it.[126]

Nevertheless, in one case the court did identify the evidence that had been provided to demonstrate the submitter's customary treatment--specifically, a consulting contract, a protective order, and markings on the documents--and the court deemed that evidence "most persuasive."[127] Similarly, evidence given in another case to show customary treatment was identified as the submitter's practice of "carefully guard[ing]" disclosure of the documents "even within the corporate structure," the markings on the documents, and the fact that the company "strenuously, and successfully, opposed their production in discovery in

---

[123] Id.

[124] 975 F.2d at 879.

[125] Id.

[126] See Cortez, 921 F. Supp. at 13 (submitter's "unrefuted sworn affidavits attest to the fact that G & A rate ceilings are the type of information that is not regularly disclosed to the public"); Thomas, No. 91-3278, slip op. at 6 (D.D.C. Oct. 7, 1994) ("uncontradicted affidavits reveal that the information is of a kind that the provider would not normally release to the public"); Minntech, No. 92-2720, slip op. at 8 n.3 (D.D.C. Nov. 17, 1993) ("The Court accepts HHS's declarations that the type of information provided is not the type that dialysis centers would release to the public."); Government Accountability, No. 86-1976, slip op. at 11 (D.D.C. July 2, 1993) (it "is not to be doubted" that documents are "unavailable to the public"); Environmental Tech., 822 F. Supp. at 1229 (it is "readily apparent that the information is of a kind that [the submitter] would not customarily share with its competitors or with the general public"); Cohen, Dunn, No. 92-0057-A, transcript at 27 (E.D. Va. Sept. 10, 1992) (pricing information "is of a kind that would customarily not be released to the public by the entity from which it is obtained"); Harrison v. Lujan, No. 90-1512, slip op. at 1 (D.D.C. Dec. 8, 1992) (agency's "uncontradicted evidence . . . establishes that the documents at issue contain information that the provider would not customarily make available to the public"); Allnet, 800 F. Supp. at 990 ("it has been amply demonstrated that [the submitters] would not customarily release the information to the public").

[127] AGS, No. 92-2714, slip op. at 11 (D.N.J. Sept. 16, 1993).

multiple civil cases."[128] In yet another case, the court provided some useful elaboration on this issue by specifically noting and then rejecting, as "vague hearsay," the requester's contention that there had been "prior, unrestricted disclosure" of the information at issue.[129] In so doing, the court expressly found the requester's evidence to be "nonspecific" and lacking precision "regarding dates and times" of the alleged disclosures; conversely, it noted that the submitter had "provided specific, affirmative evidence that no unrestricted disclosure" had occurred.[130] Accordingly, the court concluded that it had been "amply demonstrated" that the information satisfied the customary treatment standard of Critical Mass.[131]

In creating this customary treatment standard, the D.C. Circuit in Critical Mass articulated the test as dependent upon the treatment afforded the information by the individual submitter and not the treatment afforded the information by an industry as a whole.[132] This approach has been followed by all the cases applying the customary treatment standard thus far, although one court also found it "relevant" that the requester--who was a member of the same industry as the submitters--had, "up until the eve of trial," taken the position that the type of information at issue ought not to be released.[133] Further, as applied by the D.C. Circuit in Critical Mass, the customary treatment standard allows for some disclosures of the information to have been made, provided that such disclosures were not made to the general public.[134]

---

[128] McDonnell Douglas, 922 F. Supp. at 242.

[129] Allnet, 800 F. Supp. at 989.

[130] Id.

[131] Id. at 990. But cf. Atlantis Submarines Haw., Inc. v. United States Coast Guard, No. 93-00986, slip op. at 9 (D. Haw. Jan. 28, 1994) (although not expressly ruling on customary treatment standard, court upheld agency's decision to release voluntarily submitted safety report that was provided to agency in effort to "influence" its "regulatory decisions," finding that "after seeking to have its safety-related material incorporated into . . . [agency's] decision-making process," submitter could not then "have the report exempted from public disclosure") (denying motion for preliminary injunction in reverse FOIA suit), dismissed per stipulation (D. Haw. Apr. 11, 1994).

[132] 975 F.2d at 872, 878, 879, 880; accord FOIA Update, Spring 1993, at 7 (advising agencies applying customary treatment standard to examine treatment afforded information by individual submitter).

[133] Cohen, Dunn, No. 92-0057-A, transcript at 27 (E.D. Va. Sept. 10, 1992).

[134] See 975 F.2d at 880 (specifically citing to lower court decision that noted records had been provided to numerous interested parties under nondisclosure agreements, but had not been provided to public-at-large); accord FOIA Update, Spring 1993, at 7 (advising agencies that customary treatment standard allows submitter to have made some disclosures of information, provided such dis-

(continued...)

EXEMPTION 4

As a matter of sound administrative practice the Department of Justice has advised agencies to employ procedures analogous to those set forth in Executive Order 12,600[135] when making determinations under the customary treatment standard.[136] (For a further discussion of this executive order and its requirements, see Exemption 4, Competitive Harm Prong of National Parks, below, and "Reverse" FOIA, Executive Order 12,600, below.) Accordingly, whenever an agency is uncertain of a submitter's customary treatment of requested information, the submitter should be notified and given an opportunity to provide the agency with a description of its treatment of the information, including any disclosures that are customarily made and the conditions under which such disclosures occur.[137]

Impairment Prong of National Parks

For information that is "required" to be submitted to an agency, the Court of Appeals for the District of Columbia Circuit has held that the tests for confidentiality originally established in National Parks & Conservation Ass'n v. Morton,[138] continue to apply.[139] The first of these tests, the impairment prong, traditionally has been found to be satisfied when an agency demonstrates that the information at issue was provided voluntarily and that submitting entities would not provide such information in the future if it were subject to public disclosure.[140] Conversely, protection under the impairment prong traditionally has been denied when the court determines that disclosure will not, in fact, diminish the flow of information to the agency[141]--for example, when it deter

---

(...continued)
closures are not "public" ones).

[135] 3 C.F.R. 235 (1988), reprinted in 5 U.S.C. § 552 note (1994) and in FOIA Update, Summer 1987, at 2-3.

[136] See FOIA Update, Spring 1993, at 7.

[137] See id.

[138] 498 F.2d 765, 770 (D.C. Cir. 1974).

[139] Critical Mass Energy Project v. NRC, 975 F.2d 871, 880 (D.C. Cir. 1992) (en banc).

[140] See, e.g., Bowen v. FDA, 925 F.2d 1225, 1228 (9th Cir. 1991) (manufacturing formulas, processes, quality control and internal security measures submitted voluntarily to FDA to assist with cyanide-tampering investigations protected pursuant to impairment prong because agencies relied heavily on such information and would be less likely to obtain it if businesses feared it would be made public); Klayman & Gurley v. United States Dep't of Commerce, No. 88-0783, slip op. at 4 (D.D.C. Apr. 17, 1990); ISC Group v. DOD, No. 88-0631, slip op. at 7 (D.D.C. May 22, 1989); Landfair v. United States Dep't of the Army, 645 F. Supp. 325, 328 (D.D.C. 1986).

[141] See, e.g., Pentagon Fed. Credit Union v. National Credit Union Admin., (continued...)

mines that the benefits associated with submission of particular information make it unlikely that the agency's ability to obtain future such submissions will be impaired.[142]

(...continued)
No. 95-1475-A, slip op. at 4 (E.D. Va. June 7, 1996) (no impairment based on "merely speculative fear" that "disclosure might discourage future responses from credit unions"); Nadler v. FDIC, 899 F. Supp. 158, 161 (S.D.N.Y. 1995) (dicta) (no impairment possible when agency "gained access to [submitter's] information by operation of law when it became receiver"), aff'd on other grounds, 92 F.3d 93 (2d Cir. 1996); Key Bank of Me., Inc. v. SBA, No. 91-362-P, slip op. at 7 (D. Me. Dec. 31, 1992) (no impairment based on speculative assertion that public disclosure of Dun & Bradstreet reports will adversely affect company's profits and thus make it "unlikely" that credit agencies will do business with government; this "intimation regarding impairment of profits in no way speaks to the ability of affected credit agencies to continue to exist and supply needed data"); Wiley Rein & Fielding v. United States Dep't of Commerce, 782 F. Supp. 675, 677 (D.D.C. 1992) (no impairment given fact that requested documents contained no "sensitive information" and there was "no reason to believe" that such information would not be provided in future), appeal dismissed as moot, No. 92-5122 (D.C. Cir. Mar. 8, 1993).

[142] See, e.g., Martin Marietta Corp. v. Dalton, No. 94-2702, 1997 WL 459831, at *3 (D.D.C. Aug. 8, 1997) (dictum) (no impairment from release of cost, pricing, and management information incorporated into government contract because contractors "will continue bidding for [agency] contracts despite the risk of revealing business secrets if the price is right") (reverse FOIA suit); Cohen v. Kessler, No. 95-6140, slip op. at 12 (D.N.J. Nov. 25, 1996) (no impairment from release of raw research data submitted in support of application for approval of new animal drug "in light of the enormous profits that drug manufacturers reap through product development and improvement"); Bangor Hydro-Elec. Co. v. United States Dep't of the Interior, No. 94-0173-B, slip op. at 9 (D. Me. Apr. 18, 1995) (no impairment because "it is in the [submitter's] best interest to continue to supply as much information as possible" in order to secure better usage charges for its lands); RMS Indus. v. DOD, No. C-92-1545, slip op. at 7 (N.D. Cal. Nov. 24, 1992) (no impairment from release of "contract bid prices, terms and conditions . . . since bids by nature are offers to provide goods and/or services for a price and under certain terms and conditions"); Buffalo Evening News, Inc. v. SBA, 666 F. Supp. 467, 471 (W.D.N.Y. 1987) (no impairment because it is unlikely that borrowers would decline benefits associated with obtaining loans simply because status of loan was released); Daniels Mfg. Corp. v. DOD, No. 85-291, slip op. at 6 (M.D. Fla. June 3, 1986) (no impairment when submission "virtually mandatory" if supplier wished to do business with government); Badhwar v. United States Dep't of the Air Force, 622 F. Supp. 1364, 1377 (D.D.C. 1985) (same), aff'd in part & rev'd in part on other grounds, 829 F.2d 182 (D.C. Cir. 1987); Racal-Milgo Gov't Sys. v. SBA, 559 F. Supp. 4, 6 (D.D.C. 1981) (no impairment because "[i]t is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed"). But see Orion Research, Inc. v. EPA, 615 F.2d 551, 554 (1st Cir. 1980) (finding (continued...)

EXEMPTION 4

Under the new categorical test announced by the D.C. Circuit in Critical Mass Energy Project v. NRC, the voluntary character of an information submission is now sufficient to render it exempt, provided the information would not be customarily released to the public by the submitter.[143] (For a further discussion of this point, see Exemption 4, Applying Critical Mass, above.) In this regard, the D.C. Circuit has made it clear that an agency's unexercised authority, or mere "power to compel" submission of information, does not preclude such information from being provided to the agency "voluntarily."[144] This holding was compatible with several decisions rendered prior to Critical Mass that had protected information under the impairment prong despite the existence of agency authority that could have been used to compel its submission.[145]

As a result of the D.C. Circuit's ruling in Critical Mass the significance of the impairment prong is undoubtedly diminished.[146] Nevertheless, the D.C. Circuit recognized that even when agencies require submission of information "there are circumstances in which disclosure could affect the reliability of such data."[147] Thus, in the aftermath of Critical Mass, the impairment prong of Na-

---

(...continued)
impairment for technical proposals submitted in connection with government contract because release "would induce potential bidders to submit proposals that do not include
novel ideas"); RMS, No. C-92-1545, slip op. at 7 (N.D. Cal. Nov. 24, 1992) (finding impairment for equipment descriptions, employee, customer, and subcontractor names submitted in connection with government contract because "bidders only submit such information if it will not be released to their competitors"); Cohen, Dunn & Sinclair, P.C. v. GSA, No. 92-0057-A, transcript at 29 (E.D. Va. Sept. 10, 1992) (bench order) (finding impairment for detailed unit price information despite lack of "actual proof of a specific bidder being cautious in its bid or holding back").

[143] 975 F.2d at 879.

[144] Id. at 880; see FOIA Update, Spring 1993, at 5 ("OIP Guidance: The Critical Mass Distinction Under Exemption 4"); see also id. at 6-7 ("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking").

[145] See, e.g., Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 n.29 (D.C. Cir. 1983) (whether submissions are mandatory was a factor to be considered in an impairment claim, but was "not necessarily dispositive"); Washington Post Co. v. HHS, 690 F.2d 252, 268-69 (D.C. Cir. 1982). But see Teich v. FDA, 751 F. Supp. 243, 251 (D.D.C. 1990) (when "compelled cooperation will obtain precisely the same results as voluntary cooperation, an impairment claim cannot be countenanced.") (decided prior to Critical Mass and thus now in conflict with that decision), appeal voluntarily dismissed, No. 91-5023 (D.C. Cir. July 2, 1992).

[146] See FOIA Update, Spring 1993, at 7.

[147] Critical Mass, 975 F.2d at 878 (citing Washington Post, 690 F.2d at 268-
(continued...)

tional Parks now applies to those situations where information is required to be provided, but where disclosure of that information under the FOIA will result in a diminution of the "reliability" or "quality" of what is submitted.[148]

If an agency determines that release will not cause impairment, that decision should be given extraordinary deference by the courts.[149] In this regard there

---

(...continued)
69); see Goldstein v. HHS, No. 92-2013, slip op. at 5 (S.D. Fla. May 21, 1993) (magistrate's recommendation) (rejecting argument that decision in Critical Mass "essentially did away" with impairment prong and noting that under that decision "it is appropriate to consider whether or not disclosure of the information would undermine the government's interest in insuring its reliability"), adopted (S.D. Fla. July 21, 1993).

[148] See Critical Mass, 975 F.2d at 878; accord Niagara Mohawk Power Corp. v. United States Dep't of Energy, No. 95-0952, transcript at 13 (D.D.C. Feb. 23, 1996) (bench order) (protecting information submitted by electrical power producers because agency might otherwise "find it difficult" to obtain "reliable information" and producers might "not be fully forthcoming" with agency) (appeal pending); Africa Fund v. Mosbacher, No. 92-289, slip op. at 17 (S.D.N.Y. May 26, 1993) (protecting information submitted with export license applications as it "fosters the provision of full and accurate information"); see also Goldstein, No. 92-2013, slip op. at 5, 7 (S.D. Fla. May 21, 1993) (protecting information concerning laboratory's participation in drug-testing program as it furthers agency's ability to continue to receive reliable information). But see Public Citizen Health Research Group v. FDA, 964 F. Supp. 413, 415 (D.D.C. 1997) (rejecting, as "unsupported, even by an assertion of agency experience on the point," agency's claim "that data submitted to the agency as part of its drug approval process `would not be submitted as freely'" if requested document were disclosed (quoting agency declaration)); Silverberg v. HHS, No. 89-2743, slip op. at 11-12 (D.D.C. June 14, 1991) (rejecting, as "entirely speculative," claim of qualitative impairment based on contention that laboratory inspectors--who work in teams of three and whose own identities are protected--would fear litigation and thus be less candid if names of laboratories they inspected were released), appeal dismissed per stipulation, No. 91-5255 (D.C. Cir. Sept. 2, 1993); Teich, 751 F. Supp. at 252 (rejecting, as "absurd," submitter's contention that companies would be less likely to conduct and report safety tests to FDA for fear of public disclosure because companies' own interests in engendering good will and in avoiding product liability suits is assurance that they will conduct "the most complete testing program" possible).

[149] See, e.g., General Elec. Co. v. NRC, 750 F.2d 1394, 1402 (7th Cir. 1984) (court observes that there is not "much room for judicial review of the quintessentially managerial judgment" that disclosure will not cause impairment) (reverse FOIA suit); CC Distribs. v. Kinzinger, No. 94-1330, slip op. at 9-10 (D.D.C. June 28, 1995) (court "defers" to decision of agency that its "information-gathering abilities will not be impaired by release") (reverse FOIA suit); Chemical Waste Management, Inc. v. O'Leary, No. 94-2230, slip op. at 9 (D.D.C.
(continued...)

have been a few decisions addressing the feasibility of a submitter raising the issue of impairment on behalf of an agency. In one, the district court ruled that a submitter has "standing" to raise the issue of impairment.[150] Subsequently, however, an appeals court, specifically the Court of Appeals for the Fourth Circuit, refused to allow a submitter to make an impairment argument on the agency's behalf.[151] That appellate court decision was, in turn, subsequently relied on by a lower court which found that because "it is the government's interests that are protected" by the impairment prong, "it follows that it is the government that is best situated to make the determination of whether disclosure would inhibit future submissions."[152] The court noted that "it would be nonsense to block disclosure" of information "under the purported rationale of protecting government interests" when the government itself "wants to disclose" it.[153]

More than a decade ago, in Washington Post Co. v. HHS, the D.C. Circuit held that an agency must demonstrate that a threatened impairment is "significant," because a "minor" impairment is insufficient to overcome the general disclosure mandate of the FOIA.[154] Moreover, in Washington Post the D.C. Circuit held that the factual inquiry concerning the degree of impairment "necessarily involves a rough balancing of the extent of impairment and the importance of the information against the public interest in disclosure."[155] Because the case was remanded for further proceedings, the court found it unnecessary to decide the details of such a balancing test at that time.[156]

Five years later, in the first panel decision in Critical Mass, the D.C. Circuit cited Washington Post to reiterate that a threatened impairment must be significant, but it made no mention whatsoever of a balancing test.[157] The notion of a balancing test was resurrected in a subsequent decision of the D.C.

(...continued)
Feb. 28, 1995) (same) (reverse FOIA suit); AT&T Info. Sys. v. GSA, 627 F. Supp. 1396, 1401 (D.D.C. 1986) (court finds that agency "`is in the best position to determine the effect of disclosure on its ability to obtain necessary technical information'" (quoting Orion, 615 F.2d at 554)), rev'd on procedural grounds & remanded, 810 F.2d 1233 (D.C. Cir. 1987) (reverse FOIA suit).

[150] United Techs. Corp. v. HHS, 574 F. Supp. 86, 89 (D. Del. 1983).

[151] Hercules, Inc. v. Marsh, 839 F.2d 1027, 1030 (4th Cir. 1988).

[152] Comdisco, Inc. v. GSA, 864 F. Supp. 510, 515 (E.D. Va. 1994) (reverse FOIA suit).

[153] Id. at 516.

[154] 690 F.2d at 269.

[155] Id.

[156] Id.

[157] 830 F.2d 278, 286 (D.C. Cir. 1987), vacated en banc, 975 F.2d 871 (D.C. Cir. 1992).